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No. 91-756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit has the authority to dismiss appellants' case for failure to comply with court orders.

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RESPONDENT'S BRIEF IN OPPOSITION

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* Wilson & McIlvaine has no subsidiaries or parent companies.

STATEMENT OF THE CASE [1]

On August 24, 1990, petitioners Joan P. Whitmer and Frank L. Whitmer ("petitioners") appealed the district court's dismissal of their case for want of prosecution to the United States Court of Appeals for the Seventh Circuit ("Appellate Court"). The appeal was never briefed on the merits.

On September 10, 1990, petitioners filed a motion for extension of time to file their brief, which the Appellate Court granted, extending the due date. On October 26, 1990, petitioners filed a second motion for extension of time to file their brief, which the Appellate Court granted, extending the due date to December 14. On December 14, 1990, petitioners filed a third "emergency" motion for extension of time to file their brief, followed by a fourth "supplementary" motion on January 7, 1991.

On January 10, 1991, the Appellate Court, on its own motion, stayed briefing until it resolved the pending motions for extension of time. On January 25, 1991, the Appellate Court ordered petitioners to file their brief by February 25, specifically directing that the appeal would be dismissed if petitioners failed to comply. *See* Petitioners' brief at A13.

On February 8, 1991, certain of the defendants moved to dismiss the appeal on jurisdictional grounds. The Appel-

[1] Petitioners' statement of the case omits and mischaracterizes much of the procedural history in this action and is replete with allegations that have no basis in the record. Therefore, respondent presents this Court with a short summary of the history of the case.

late Court ordered briefing stayed pending a ruling on those defendants' motions to dismiss. On March 15, 1991, the Appellate Court granted the motions to dismiss.

On April 22, 1991, petitioners requested a fifth extension of time to delay all due dates until after a brief was due in another action involving petitioners. On April 25, 1991, the Appellate Court reinstated the appeal, and ordered petitioners to file their brief by May 3, 1991, stating for a second time that a failure to do so would result in dismissal of the appeal. *See* Petitioners' brief at A8.

On April 29, 1991, petitioners requested a sixth extension of time, which the Appellate Court denied, stating for a third time that failure to file a brief as ordered would result in dismissal of the appeal. *See* Petitioners' brief at A7. On May 4, 1991, one day after petitioners' brief was due, petitioners requested a seventh extension of time.

On May 10, 1991, petitioners still had not filed their brief. The Appellate Court denied the pending request for an extension of time and dismissed petitioners' appeal for want of prosecution. *See* Petitioners' brief at A5. After several more motions from the petitioners, the Appellate Court directed the clerk of the court not to accept any more filings from petitioners on that appeal. After obtaining an extension of time from this Court, petitioners filed their Petition for Writ of Certiorari on Nov. 4, 1991.

SUMMARY OF ARGUMENT

The only issue before this Court is the propriety of the Appellate Court's dismissal of petitioners' appeal for want of prosecution. The Appellate Court granted a number of extensions over an eight month period. Petitioners were given ample opportunity to file a brief and were warned that failure to file a brief would result in dismissal. The Appellate Court's dismissal was proper in light of the circumstances of this case. Additionally, petitioners have not presented this Court with a significant legal issue requiring review. Therefore, this Court should deny the Petition.

ARGUMENT

A. THE ONLY ISSUE BEFORE THIS COURT IS THE APPELLATE COURT'S DISMISSAL OF PETITIONERS' APPEAL FOR WANT OF PROSECUTION.

Petitioners raise a myriad of issues and "questions presented" which are not properly before this Court on the Petition for Certiorari. The only question before this Court is the propriety of the dismissal of petitioners' appeal.

The jurisdiction of this Court to review the Appellate Court's dismissal of petitioners' appeal is invoked under 28 U.S.C. § 1254 (1988). That section provides in relevant part:

> Cases *in the courts of appeals* may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party . . . . [emphasis added]

28 U.S.C. § 1254 (1988).

The Appellate Court did not address the merits of the appeal. The only decision made by the Appellate Court, and thus the only issue presented for review, was the dismissal of petitioners' appeal.[2] Only in exceptional cases has this Court considered questions presented in a petition for certiorari that have not been considered by the appellate court. *Patrick v. Burget*, 486 U.S. 94, 99, n.5 (1988) ("This Court will usually decline to consider questions presented in a petition for certiorari that have not been considered by the lower [appellate] court."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not resolve questions not raised or resolved in the lower court"); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."); *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals."); see also *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957).

Exceptional circumstances do not exist in this case. Petitioners are not challenging as unconstitutional any state or federal statute, nor are they asserting any conflict among the circuits. Consequently, any reference in peti-

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[2] The district court also dismissed petitioners' cause for want of prosecution.

tioners' brief to the alleged merits of their claim (neither the district court nor the Appellate Court reached the merits of petitioners claim) or to any district court ruling[3] is irrelevant to this appeal of the Appellate Court's dismissal.

B. THE APPELLATE COURT'S DISMISSAL OF PETITIONERS' APPEAL WAS PROPER.

Petitioners have presented an endless series of motions for stays and continuances of briefing schedules, consistently failing to brief matters in a timely fashion so as to reach the merits. In the district court, petitioners had not yet responded to the defendants' motions to dismiss, in a case which had been pending for almost 3 years at the time of that dismissal. The Appellate Court waited eight months for the petitioners to file their brief and, after repeated warnings, finally dismissed the appeal. The petitioners have appealed, moved to vacate, or sought rehearing of virtually any substantive order, and then have moved for repeated extensions of time to conduct the briefing.

An appellate court has the power to dismiss an appeal for failure to prosecute. *Link v. Wabash R.R.*, 370 U.S. 626, 629 (1962). Dismissal is proper where a party fails to follow court orders and rules. *Guam Sasaki Corporation v. Diana's, Inc.*, 881 F.2d 713 (9th Cir. 1989) (holding that the appellate court had authority to dismiss appeal for appellant's failure to comply with order which was clear on its face in requiring appellant to file brief after

[3] Because the Appellate Court did not review any of the district court's orders, those orders are not before this Court. If, as alleged, the Appellate Court dismissal was incorrect, then the proper procedure is to reverse the dismissal and remand the case back to the Appellate Court for further proceedings.

lower court proceedings concluded); *Barber v. American Sec. Bank*, 841 F.2d 1159, 1162 (D.C. Cir. 1988) ("Counsel's failure to file his brief on time and his failure to file the proper motions evidence inexcusable disregard for the rules of this court and thus warrant dismissal."); *Julien v. Zenringue*, 864 F.2d 1572 (Fed. Cir. 1989) ("failure to comply with this court's rules, including the requirements for preparing and filing briefs, appendices and other papers, may result in dismissal of an appeal for failure to prosecute").

Contrary to petitioners' assertions (*See* Petitioners' brief at p. 26), the Appellate Court has given petitioners ample time to file their brief. The brief was originally due forty days after the appeal was docketed—on October 10, 1990. After numerous extensions and stays, the brief finally became due on May 3, 1991, 205 days after it was originally due. Thus petitioners had 245 days to complete the brief, instead of the 40 days granted by the Rules of Appellate Procedure. The dismissal was hardly a surprise; the Appellate Court had warned petitioners repeatedly that failure to file a brief on the due date would result in dismissal.

A party's violation of briefing schedules and filing responsibilities is a serious matter. *Stotler and Co. v. Able*, 837 F.2d 1425, 1427 (7th Cir. 1988) ("Orders fixing the schedule for briefing an appeal must be obeyed if the business of the federal courts is to be conducted with appropriate dispatch, and we take violations of such orders seriously."). If the judicial process is to function effectively, the Appellate Court must retain the ability to control its docket and dismiss cases where an appellant fails to timely perform its duties. *See Thermocycle Int'l. Inc. v. A.F. Hinrichsen Sales Corp.*, 851 F.2d 339, 341 (Fed. Cir.

1988). Petitioners had been given approximately eight months to file their brief. The Appellate Court on three separate occasions specifically warned petitioners that their cause would be dismissed if the brief was not filed. The Court waited an additional seven days after the brief was due before dismissing the case. In light of these circumstances, the Seventh Circuit properly and responsibly dismissed petitioners' appeal for want of prosecution.

Petitioners contend that the Appellate Court failed to follow its own Circuit Rule 31(c) of the United States Court of Appeals for the Seventh Circuit. That rule provides:

> (c) *Failure of Appellant to File Brief.* When an appellant's original brief is not filed when it is due, the procedure shall be as follows:
>
> (1) All Criminal Cases in Which the Defendant Has Counsel and Civil Cases With Court-Appointed Counsel. The clerk shall enter an order directing counsel to show cause within 14 days why disciplinary action should not be taken. The court will then take appropriate action.
>
> (2) All Other Cases. *The clerk shall enter an order directing counsel, or a pro se appellant, to show cause why the appeal should not be dismissed. The court will then take appropriate action.*

(emphasis added.)

The Appellate Court was acutely aware of Circuit Rule 31(c)(2) when it dismissed petitioners' appeal. The April 25, 1991 order specifically stated:

> [O]ur reinstatement of this appeal raises a secondary question as to whether this appeal should be dismissed for want of prosecution under Circuit Rule 31(c)(2). Although the court placed briefing in

> abeyance upon the filing of the motion to dismiss, *see* order of February 8, 1991, we had previously warned appellants in our order of January 25, 1991, that this case would be dismissed for failure to prosecute if appellants did not file their brief pursuant to that order. Accordingly,
>
> IT IS FURTHER ORDERED that appellants file their opening brief and short appendix by May 3, 1991. *Failure to so file will result in the dismissal of this case pursuant to Circuit Rule 31(c)(2).* [emphasis supplied].

See Petitioners' brief at A9.

Fifteen days later, On May 10, 1991, the same panel stated:

> On April 25, 1991, we ordered appellants to file their opening brief by May 3, 1991, or face dismissal of their appeal for want of prosecution. Since that order, appellants have filed two emergency motions to abate briefing; however, they have chosen not to file a brief. The brief in this case was originally due in October 1990. We have granted several extensions of time, none of which have produced a brief. Accordingly, this appeal is DISMISSED FOR WANT OF PROSECUTION.

See Petitioners' brief at A6.

The Appellate Court gave explicit notice to petitioners that the appeal would be dismissed pursuant to Circuit Rule 31(c)(2) if they did not file a brief.

The purpose of Seventh Circuit Rule 31(c)(2) is to place the appellant on notice that its appeal may be dismissed unless it can provide a satisfactory reason for its late filing. *See Stotler and Co. v. Able*, 837 F.2d 1425 (7th Cir. 1988). In *Stotler*, the court held that an appellee's motion to dismiss is an adequate substitute for a rule to

show cause under 31(c)(2) because it notifies the appellant that its case may be dismissed. *Id.* at 1427.[4] The key to Rule 31(c)(2) is notice, not the specific procedure of a rule to show cause. The numerous court orders, warning petitioners of dismissal, was sufficient notice of the sanction for failure to file a brief. Accordingly, Circuit Rule 31(c)(2) was satisfied.

Even if one adopts petitioners' contention that Seventh Circuit Rule 31(c)(2) requires a rule to show cause proceeding, the Appellate Court's failure to invoke that process is not sufficiently material to constitute reversible error. In *Instituto Nacional v. Continental Illinois National Bank*, 858 F.2d 1264 (7th Cir. 1988), the court analyzed Seventh Circuit Rule 31(d), which, as under rule 31(c)(2), requires the clerk to enter an order to show cause (except that Rule 31(d) applies to appellee's briefs rather than appellant's briefs). In *Instituto Nacional*, the court stated that the clerk's failure to enter an order to show cause under Rule 31(d) was immaterial. *Id.* at 1271. The court then applied Rule 31(d) as if the order to show cause had been given. Certainly in the present case, the court's notice to the petitioners suffices and does not constitute material error.

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[4] Specifically, the court stated,

> [t]he procedure in Seventh Circuit Rule 31(c)(2) for issuing a rule to show cause when a brief is not filed on time is intended for cases where no motion to dismiss has been filed and the court is acting on its own initiative . . . A motion to dismiss, as filed in this case, is an adequate substitute for a rule to show cause; it places the appellant on notice that its appeal may be dismissed unless it comes forward with grounds excusing its late filing." *Stotler* at 1427.

C. THE ISSUE RAISED BY PETITIONERS IS NOT SUFFICIENTLY IMPORTANT TO REQUIRE REVIEW BY THE SUPREME COURT.

A writ of certiorari will be granted only where there exists special and important reasons for doing so. Supreme Court Rule 10. Petitioners do not present this Court with an issue in which there is a conflict among the circuit courts or a conflict with any state court of last resort. Moreover, the United States Court of Appeals for the Seventh Circuit has not departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision under Supreme Court Rule 10.1(a).

The relevant issue in this case does not raise an important question of federal law which has not been, but should be, settled by this Court. Supreme Court rule 10.1(c). There is no constitutional question involved, and any resolution of petitioner's allegations would not contribute to the development of national law. There is simply no argument over the law and its applicability in this case. The issue before this Court is one of appellate court housekeeping. The valuable resources of the Supreme Court should not be squandered on issues of extensions of time.

CONCLUSION

The Appellate Court's dismissal of petitioners' appeal was proper and responsible in light of the numerous extensions of time granted to petitioners. The Court gave notice that dismissal would occur if a brief was not filed by the due date. This case does not raise any legal issues sufficient to warrant review by this Court. Therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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